PROVINCE OF LOWER-CANADA.

COURT OF APPEALS.

July Session, 1817.

JOHN MURE & ROBERT MORROGH, Esquires,

Appellants.

vs.

ARCHIBALD MOORE,

Respondent.

RESPONDENT'S CASE.

PROVINCE OF LOWER-CANADA.

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JOHN MURE AND ROBERT MORROGH, Esquires,

APPELLANTS.

vs.

ARCHIBALD MOORE,

RESPONDENT.

IN APPEAL *from a Judgment for £1517. 6s. 3d. Currency, rendered in the Court of King's Bench for the District of Quebec, 20th April,* 1818, *in a Cause there, in which the above-named Respondent, Archibald Moore, was the Plaintiff, and the above-named Appellants, John Mure and Robert Morrogh, were the Defendants.*

RESPONDENT'S CASE.

THIS was an Action brought in the Court of King's Bench at Quebec, by the Respondent, as the obligee in a Bond which had been entered into by the above-named Appellants who were Agents for the consignees of the cargo of the Ship Mary, of Greenock, in consideration of the delivery of such cargo to them, to Archibald Moore, the Respondent, who was the Master of the said ship, in the penalty of £4000, currency, for payment of the amount of such contribution for Salvage or general average as might take place under any agreement or arrangement to be made at Halifax relative to the cargo of the said ship, which had been captured by an American Privateer and afterwards re-captured by His Majesty's Sloop of War, the Martin; and for which salvage a general sentence or interlocutory decree of the Court of Vice-Admiralty at Halifax had, as it appears, been obtained antecedent to the date of the Bond, but the amount whereof then remained to be ascertained.

The Bond was as follows:

"Know all men by these presents, that on this day, the third of August, "in the year of our Lord one thousand eight hundred and fourteen, Before us the "undersigned Notaries, duly admitted and sworn for the Province of Lower-Ca-"nada, dwelling in the City of Quebec in the said Province, personally came and "appeared John Mure and Robert Morrogh, both of the City of Quebec, Esquires, "who acting for and in the name of Messieurs Forsyth, Richardson and Com-"pany of the City of Montreal, Merchants, the consignees of the cargo in the Ship "Mary laden, of the burthen of two hundred and seventy tons per Register, be-"longing to the Port of Greenock, and whereof Archibald Moore is Master, de-"clared to be jointly and severally held and firmly bound unto the said Archibald "Moore and to one another in the sum of four thousand pounds, current money "of this Province of Lower-Canada, to be paid to the said Archibald Moore or "to his certain Attorney, Executors or Administrators, and to each of them severally "and respectively, their and each of their several Heirs, Executors and Adminstra-"tors, for which payment to be well and truly made, they bind themselves jointly "and severally, and each of them by himself, their Executors, Administrators and "Assigns, for and in the whole by these presents.

"Whereas the said Archibald Moore, the commander of the said ship, did on "the twenty-fifth day of March last set sail in and with the said ship with a cargo "of Flour and Wine on board from Waterford in Ireland bound to this port of "Quebec, but to touch at Cork to join convoy. That having joined convoy on "the tenth day of April last, he sailed from Cork in the prosecution of his "original voyage for Quebec, and kept company with the fleet and convoy until "the sixteenth day of May last, when in very thick foggy weather he lost sight of "the convoy and continued in the prosecution of his voyage, without meeting any "remarkable occurrence until the twenty-first day of May, when he fell in with "and was captured by the Privateer Schooner Diomede, John Crowninshields, "Master. And whereas the said ship Mary being afterwards re-captured and sent

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" into Halifax by H. M. sloop Martin, the said ship together with her cargo were,
" by the sentence of the Court of Vice-Admiralty of Nova-Scotia condemned to
" salvage.

" They therefore, the above bounden John Mure and Robert Morrogh, acting
" for and in the name of the consignees of the cargo in the said ship laden, do
" hereby severally and respectively covenant, promise and agree to contribute their
" share and proportion of said salvage according to the decree of the said Court.

" Now the condition of the above written obligation is such, that if the above
" bounden persons shall and will, acting as aforesaid, well and truly pay the amount
" of contribution or general average, as is herein-before set forth, and under any
" agreement or arrangement made at Halifax relative to the payment thereof, then
" this obligation to be null and void, otherwise to be and remain in full force and
" virtue. Thus done and passed in the City of Quebec aforesaid, the day, month
" and year above written, in the office of Archibald Campbell, one of the undersigned Notaries.

" In witness whereof the said John Mure and the said Robert Morrogh have
" hereunto set their hands in the presence of us the said Notaries, who have also
" hereunto set our names in Faith and Testimony of the promises. Signed on
" the original, John Mure, Robert Morrogh, B. Faribault, Notary Public, Archibald
" Campbell, Notary Public, as appears by the same, remaining of Record in my
" Office.

(Signed)

(L. S.) **ARCHIBALD CAMPBELL,**

Notary Public.

The declaration in the Court of King's Bench, for the district of Quebec, dated 13th October, 1815, states that theretofore, viz. 3d. August, 1814, the defendants, John Mure and Robert Morrogh, by a certain obligation made and passed before Campbell and Faribault, Notaries Public, became jointly and severally held and firmly bound in the sum of £4000 currency, to be paid to the said Plaintiff or his certain Attorney, &c. for which payment to be well and truly made, they the said John Mure and Robert Morrogh bound themselves jointly and severally, their heirs, executors, administrators, and assignes for and in the whole by the said obligation or writing obligatory, yet the said John Mure and Robert Morrogh *(licet sæpius requisiti, &c.)* had not paid the same, &c.

The second count is to the same effect as the first, only stating the payments to be made by the Defendants, " when thereunto afterwards requested."

The third count sets forth the condition, and avers that after the making of the said bond, a certain arrangement was made at Halifax, relative to the said general average or contribution and the payment thereof; by which said arrangement it was settled and arranged that a large sum of Money, viz. £1929, 7s. 2¼d. currency, had become and was become due and payable for and in respect of the share and proportion of such general average or contribution, in the said condition mentioned; and then goes on to aver the non-payment of such sum, in conformity thereto.

The fourth count also states the condition, and avers that the Defendants had not paid the amount of the contribution or general average, as therein-before seth forth, as stipulated in the condition.

The fifth count is analogous to the fourth, except that instead of averring that the Defendants had not paid the general average or contribution, as set forth in the Bond; it is averred that they had not paid any general average or contribution whatsoever.

The above declaration was afterwards amended, by leave of the Court, by adding two counts; one for money paid, laid out and expended, generally by the Plaintiff for the Defendants, and the other for certain contributions and general averages before that time due owing from the Defendants to the Plaintiff.

To the above declaration the Defendants pleaded a *defense au fonds en droit*, a perpetual exception *peremptoire en droit*, and a *defense au fonds en fait*.

The perpetual exception *peremptoire en droit* stated,

1stly. That the Bond was executed by the Defendants for and in the name of Messrs. Forsyth, Richardson & Co. of Montreal, who were the consignees of the cargo, and that the Defendants were not in any manner personally liable for the amount of the general average or contribution, but that the recourse for the same (if there was any) was against Messrs. Forsyth, Richardson & Co. and not against the Defendants.

2ndly. That there was no good or valid consideration given by the Plaintiff to the Defendants for the said Bond.

3rdly. That the Plaintiff was not present before the Notaries at the time when the Bond was made.

4thly. That the agreement or arrangement mentioned in the condition did not take place, the appraisers not having been duly and legally appointed under the sanction of the Court of Vice-Admiralty at Halifax.

5thly. That if any such agreement or arrangement was made, it was made without the participation or consent of the Defendants.

6thly. That the pretended agreement or arrangement was illegal and unjust, the cargo being damaged and of less value than that at which it was estimated.

7thly. That such agreement or arrangement was not confirmed or sanctioned by the Court of Vice-Admiralty at Halifax.

And 8thly. That the agreement or arrangement was fraudulent on the part of the Plaintiff, he knowing that the cargo had been damaged and over estimated.

The objections in point of Law as to the sufficiency of the bond and declaration having been over-ruled on argument, *preuves respectives* were ordered with regard to the matters of fact in the pleadings and the cause accordingly came to trial on the merits.

The merits of the case as appearing from the evidence, in addition to the general nature of it already stated, were as follows:

The Plaintiff was the master of the Ship Mary, of Greenock, which was consigned to Rogerson, Hunter & Co. of Quebec, in 1814, captured on her voyage by an American privateer and afterwards recaptured by the Martin sloop of war, and taken into Halifax, when she was libelled against by the officers and crew of that ship, for salvage on such recapture. On this occasion a commission of appraisement having issued at Halifax, on the petition of Moore, the master, and security having been given, in pursuance of an offer for that purpose made by him, for the appraised value of the ship and cargo, she was of course restored to him, and sailed for and arrived at Quebec, which was her original port of destination. The appraised value of the ship was £3000, and that of the cargo £11,870. 10s. making in all the sum of £14,870. 10s.

The salvage decreed was an eighth of the value, making £975 for the vessel, and £1483 16s. 3d. for the cargo.

These two sums, together with the costs, were as it seems afterwards paid to Mr. Grant, the Registrar of the Court of Vice-Admiralty at Halifax, by Messrs. Forsyth, Black and company of Halifax, the latter of whom had become surety for both ship and cargo on the petition of the Captain,—see A. No. 4, of the proceedings in the Court of Vice-Admiralty at Halifax, annexed to No. 31, in the Record.

With regard to the motives of the Defendants for giving the bond in question, they were sufficiently obvious. It was done for the purpose of obtaining possession of the cargo at Quebec, which was accordingly immediately delivered over to them as is stated in the evidence of Mr. Burnett and others, see No. 34, in the Record.

The allegation with regard to the deterioration of the value, respecting which however there was noting adduced to the satisfaction of the Court, appears to have nothing to do with the matter at present in question. The business between the Plaintiff and the Defendants on his arrival at Quebec, was simply as follows. The Defendants being the consignees of the cargo, wished to have it delivered up to them. The Plaintiff had already given security at Halifax, for both ship and cargo, and was therefore liable for such salvage, as might ultimately be awarded to the officers and crew of the *Martin*, as chargeable on either the one or the other; but as he had no interest in the cargo, he had of course no objection to deliver it to the Defendants, on their giving him their bond to pay the amount of all the demands which might thus be made upon it; by which alone he and his owners could be indemnified or safe in so doing. They accordingly give this bond and the cargo is consequently delivered to them. The Cause at Halifax proceeds, and a sum of between fifteen and sixteen hundred pounds is awarded against the cargo, viz. £1483 16s. 3d. besides a proportional part of the costs which amounted to upwards of £150; and this sum it appears is accordingly actually paid by Mr. Black, who had become surety for both ship and cargo, in conformity to the offer made by the Captain in his petition.

The payment of this money is therefore the claim made by this action, and it does not appear that it would be easily possible to assign a case in which there could be less doubt or difficulty with regard to the justice and propriety of the demand.

With regard to the pretext on the part of the Defendants, that their obligation was contracted merely in the capacity of agents or sureties for others, the answer is that in every case in which a man enters into a solemn contract, by specialty, positively stipulating for the payment of a sum of money or the performance of any other act whatsoever, it matters not whether he has entered into such a contract for his own benefit or advantage solely or as agent or surety for another, nor does it signify so far as may relate to the matter between himself and the party with whom he contracts, (though it might perhaps have some operation with respect to others by whom he might afterwards be to be indemnified) whether he choose to state the grounds on which he may hope for such future indemnity or not. The Court therefore gave Judgment in this case according to the stipulation in the contract,—in conformity as it is humbly submitted to a concurrent series of authorities to the same effect.

It will be perceived on looking into the sum awarded to the Plaintiff by the Judgment that the portion of it which exceeds the £1483 16*s.* 3*d.* originally adjudged for salvage of the cargo by the Court of Vice-Admiralty is, from some error in the figures, between 50 and £60 less than the proper share of the costs, the whole amount of what he is entitled to bearing as we humbly conceive the same proportion to £1991. 10s. (the whole sum paid by Mr. Black) as £11870. 10*s.* the value of the cargo bears to £14,870. 10*s.* the whole value of both ship and cargo and which amounts consequently to £1589. 14*s.* 8*d.* instead of £1517. 6*s.* 3*d.* the sum actually given by the Judgment.